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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 321

VICTORIA A. HART,

Petitioner,

vs.

DAVID W. HEDRICK, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., Debtor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, DAVID W. HEDRICK, TRUSTEE IN BANKRUPTCY OF SEMINOLE PARK AND FAIRGROUNDS, INC., DEBTOR

DAVID W. HEDRICK
OF GILES, HEDRICK & ROBINSON
109 East Church St. (P. O. Box 2631)
Orlando, Florida 32802
Attorneys for Respondent

August 2, 1968

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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OPINIONS BELOW

The opinion of the District Court (App. i of Petitioner) has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (App. iv of Petitioner) is reported at 390 F.2d 10.

JURISDICTION

The jurisdictional requisites have been sufficiently set forth in the Petition.

QUESTION INVOLVED

Did the Circuit Court err in finding an appeal time barred when not filed within the statutory 40 days limit set forth in 11 USCA Sec. 48 and the sole equitable argument against following the statute was that Petitioner had no personal knowledge of entry of order of District Court, although her attorney of record was duly served with such Order?

STATUTES AND RULES INVOLVED

The pertinent portions of 11 USCA Sec. 47 and Sec. 48, General Order No. 36, FRCP 73(a) and Rule 4(a), Federal Rules of Appellate Procedure are set forth in the Appendix to the Petition.

28 USCA Sec. 2075 reads as follows:

"§2075. *Bankruptcy rules*

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Added Pub. L. 88-623, § 1, Oct. 3, 1964, 78 Stat. 1001."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is substantially correct except in two important particulars:

1. That after receipt of the letter of October 18, 1966, from her then attorney of record, she secured another attorney, Mr. Ralph Clayton, who appeared for her at the special hearing in question. (Stipulation between attorneys for Petitioner and Respondent dated June 30, 1967, and filed in the Circuit Court.)

2. The Fifth Circuit not only held the statutory appeal time to be mandatory and jurisdictional, but in the alternative found that even if it had jurisdiction that "there is no sufficient showing by appellant that a 'special equity existed.'"

ARGUMENT

The issue in this case is one which is extremely narrow and is not one warranting review by this Court. It involves a unique combination of law and the facts personal to Petitioner which have been resolved against her and are not apt to affect litigants in the future. The Referee and the District and Circuit Appellate Courts rightly and correctly determined the matter. This bankruptcy matter, which does directly affect many other persons and public opinion concerning the bankruptcy system, should be finally put to rest.

1. The Decision Below Is Clearly Correct.

(a) Statutory Limitation Is Mandatory and Jurisdictional.

It is uncontested that Sec. 25(a) of the Bankruptcy Act (11 USCA 48) sets the appeal time at 40 days for this case and that the appeal was not filed until 47 days after the entry of the order appealed from. The Circuit Courts of Appeal have unanimously found that such limit was mandatory and jurisdictional. Petitions for Certiorari were filed in many of the cases and this Court has consistently denied all of them.

See: *Broders* v. *Lage*, 25 F. 2d 288 (C.A. 8, 1928); *Siegel* v. *Margiotta*, 102 F. 2d 525, 526 (C.A. 2, 1939); *Matter of Country Club Bldg. Corp.*, 128 F. 2d 36 (C.A. 7, 1942); *Hyman* v. *McLendon*, 102 F. 2d 189 (C.A. 4, 1939), Cert. denied, 60 S. Ct. 74, 308 U.S. 563, 84 L. Ed. 472; *U. S.* v. *East*, 80 F. 2d 134 (C.A. 8, 1935); *Peterson* v. *Baker*, 168 F. 2d 684 (C.A. 8, 1948); *Roberts* v. *Bank of America Nat. Trust & Sav. Ass'n*, 198 F. 2d 919 (C.A. 9, 1952); *Casalduc* v. *Diaz*, 117 F. 2d 915 (C.A. 1, 1941), certiorari denied, 62 S. Ct. 74, 314 U.S. 639, 86 L. Ed. 512; *Schreiner* v. *Farmers' Trust Co. of Lancaster*, 91 F. 2d 606 (C.A. 3, 1937), certiorari denied, 58 S. Ct. 36, 302 U.S. 686, 82 L. Ed. 530; *Dupont, et al.* v. *Okeechobee County, Fla.*, 135 F. 2d 577 (C.A. 5, 1943), certiorari denied, 64 S. Ct. 56, 320 U.S. 751, 88 L. Ed. 447; *In re Aqua Hotel Corporation*, 251 F. 2d 138, 143 (C.A. 9, 1957), Cert. denied, 356 U.S. 965, 2 L. Ed. 2d 1072, 78 S. Ct. 1005; *In re Evansville Television, Inc. & Schepp, et al.* v. *Producers, Inc., et al.* 286 F. 2d 65 (C.A. 7, 1961), Cert. denied 81 S. Ct. 1048, 366 U.S. 903, 6 L. Ed. 2d 204.

It is true that in most cases Rule 73(a) FRCP would permit the District Court to extend the time of appeal up to 60 days upon a showing of excusable neglect. This rule

has been in effect since 1948 during the time when many of the above cases were decided and were thus considered by all such courts and this court on the various applications for certiorari.

This Court by General Order 36 made the rules governing appeals in civil actions applicable to appeals in bankruptcy—*"except as otherwise provided in the act."* The act sets a definite time limit (40 days) and a procedure for a shorter period (30 days), but no provision for any extension beyond 40 days. It covers the subject fully just as Rule 73(a) does. To allow Rule 73(a) to be considered as adding to the provisions of the act concerning the time for appeal would be contrary to the language of the statute and to this Court's language, intent and all previous cases on the subject.

It is also true that this Court has now promulgated a new set of rules governing all appeals in the future and that Rule 4(a) of the Federal Rules of Appellate Procedure will affect all bankruptcy appeals *after* July 1, 1968. These rules were adopted by the specific statutory authority (only adopted in 1964) which gave this Court specific authority to promulgate rules which would supersede the terms of the bankruptcy statute as to procedural matters only. See 28 USCA 2075. Not until the adoption by this Court of these rules had the statutory limitation ever been changed or construed other than that of being mandatory and jurisdictional.

(b) No Sufficient Showing of Excusable Neglect.

In the event this Court should feel that the Circuit Court should have considered the matters set forth by Petitioner, Respondent asserts that the Court did give consideration to such matters and found them lacking in

merit. The only excuse advanced by Petitioner for not filing the Notice of Appeal on time was that she personally was not aware that the lower court's order had been entered and that her then attorney of record had not kept her fully advised (R. 98). She did not say that she had directed him to appeal if the order was adverse or any other facts which would constitute grounds for equitable relief—*even if such relief were possible.* In fact, her whole behavior and the history of her claim, considering the attempt to have the Bank of New Smyrna collect the principal part of the claim (R. 33-38), indicates this approach to be a questionable attempt to impugn the character and professional ability of her former attorney. She was not unfamiliar with lawyers and legal proceedings. She had been involved in the instant proceedings for over two years and had procured another attorney to represent her at the special 21(a) hearing. (Stipulation in Circuit Court dated June 30, 1967.) No possible facts or theory sufficient to warrant any thought of departure from the set rule have been advanced.

Petitioner was fully heard and lost out on the merits of her case before the Referee and on appeal to the District Court. She has thus had two full opportunities to be heard on the merits of the case. The denial of further appeal under these circumstances is not as unjust as Petitioner would attempt to make it be.

2. There Is No Important Question of Federal Law.

As pointed out in previous argument, since the adoption of Rule 4(a) of the Federal Rules of Appellate Procedure, the question has become moot and no longer will have any importance to anyone other than the present litigants. It is merely a further attempt to secure review of rulings Petitioner disliked in the three prior tribunals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Writ of Certiorari should be denied.

Respectfully submitted,

DAVID W. HEDRICK
OF GILES, HEDRICK & ROBINSON
109 East Church St. (P. O. Box 2631)
Orlando, Florida 32802
Attorneys for Respondent

August 2, 1968

PROOF OF SERVICE

I, DAVID W. HEDRICK, one of the attorneys for David W. Hedrick, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., debtor, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of August, 1968, I served a copy of the foregoing Brief on Victoria A. Hart, Petitioner herein, by mailing a copy in a duly addressed envelope, with postage prepaid to Victoria A. Hart, Route 1, New Smyrna Beach, Florida.

DAVID W. HEDRICK
OF GILES, HEDRICK & ROBINSON
109 East Church St. (P. O. Box 2631)
Orlando, Florida 32802